

OPEN SESSION AGENDA ITEM

703 MAY 2018

DATE: May 18, 2018

TO: **Members, Board of Trustees**

FROM: Suzanne Grandt, Assistant General Counsel, Office of the General Counsel
Carolina Almarante, Program Analyst, Office of Research & Institutional
Accountability

SUBJECT: Proposed Rule of Court Re Fingerprinting Active Licensed Attorneys - Return
From Public Comment and Operational Planning and Preparation

EXECUTIVE SUMMARY

This agenda item is divided into two parts. The first part summarizes the State Bar's efforts to seek public comment on a proposed State Bar Rule regarding the impact of non-compliance with attorney fingerprinting requirements. Staff recommends that the Board adopt the new State Bar Rule.

The second part of this agenda items provides an overview of the work completed to date in preparation for fully implementing attorney fingerprinting requirements as required by the proposed California Rule of Court. Staff recommends that the Board authorize staff to implement future technical modifications to previously approved fee scaling policies as needed.

PART ONE

RETURN FROM PUBLIC COMMENT

On March 9, 2018, the Board of Trustees (Board) authorized a 30-day public comment period for a proposed State Bar Rule to address noncompliance with the recently proposed California Rule of Court requiring the re-fingerprinting of active attorneys. The proposed rule establishes that noncompliance would result in an inactive enrollment and that the enrollment would be administrative: no hearing would be required.

The public comment period on the proposed State Bar Rule began on March 21, 2018 and ended on April 20, 2018. During the public comment period the State Bar received a handful of comments that addressed the proposed California Rule of Court currently being considered by the Supreme Court, and fingerprinting generally. However, none of the comments specifically addressed the proposed State Bar Rule.

Accordingly, staff recommends that the Board adopt the proposed State Bar Rule, provided as Attachment A.

PART TWO

PLANNING FOR FINGERPRINTING ACTIVE LICENSED ATTORNEYS

In preparation for the approval of the new Rule of Court, a multi-divisional team of State Bar staff continues to meet on a weekly basis. The immediate results have led to enhancements to policy and practices within the Office of Admissions and the Office of Attorney Regulations and Consumer Resources to ensure the efficient and effective implementation of attorney fingerprinting requirements.

Ensuring that attorneys have access to timely and accurate information regarding the fingerprinting requirement is a top priority for State Bar staff. Immediately following approval of the Rule of Court, attorneys will receive an email notice to alert them that the rule was approved. The email notifications will be customized to reflect the attorneys' status – whether they need to take action or are already in compliance – and provide detailed instructions on how to submit fingerprints to become compliant. Detailed instructions for attorneys residing in state, out of state, and out of country will also be made available on the State Bar's public website. Customized status information for attorneys will be continually updated on the My State Bar Profile pages.

In March 2018, the Board approved a policy for active attorneys to receive a fee reduction to offset fingerprint processing cost for certain attorneys (See Attachment B). Staff determined the most efficient process to implement this reduction is to include a one-time credit to the 2019 or 2020 billing statements for eligible attorneys. Further modifications to this process may be required, if and when the rule is approved by the Supreme Court. Therefore, staff is seeking authorization to revise the implementation of the fee scaling policy as needed.

FISCAL/PERSONNEL IMPACT

As proposed, the initial cost to the State Bar of applying various fee waiver provisions during the 2019 billing period would be approximately \$119,000. Staff will reassess the number of new eligible attorneys to receive the fee reduction during the 2020 billing period. Staff anticipate the approximate cost for 2020 will not exceed \$119,000.

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 1. Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees adopts the proposed State Bar Rule, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the Board of Trustees authorizes staff to make necessary modifications when implementing fee scaling policies in connection with attorney fingerprinting requirements.

ATTACHMENT(S) LIST

- A.** Noncompliance with Attorney Fingerprinting Requirement
- B.** March 2018 BOT Agenda Item

ATTACHMENT A

Noncompliance with Attorney Fingerprinting Requirement

Definition

Noncompliance is failure to submit proof that fingerprints have been taken in accordance with State law and State Bar procedures.

Enrollment as inactive for fingerprinting noncompliance

A licensee determined by the State Bar to be in noncompliance with State Bar fingerprinting requirements will be enrolled as inactive and not eligible to practice law. The enrollment is administrative and no hearing is required.

All licensees will receive notices of non-compliance at least 60 days prior to involuntary inactive enrollment.

Reinstatement following fingerprinting noncompliance

Enrollment as inactive for fingerprinting noncompliance terminates when a licensee submits proof of compliance.

ATTACHMENT B

OPEN SESSION 702 AGENDA ITEM

MARCH 2018 BOARD OF TRUSTEES, ITEM 702

DATE: March 9, 2018

TO: **Members, Board of Trustees**

FROM: Suzanne Grandt, Assistant General Counsel, Carolina Almarante, Program Analyst, Office of Research and Institutional Accountability

SUBJECT: Proposed Rule of Court Re Fingerprinting Active Licensed Attorneys: Return from Public Comment and Approval of State Bar Policies

EXECUTIVE SUMMARY

On January 27, 2018, staff presented the Board of Trustees (Board) with an overview of the approximately 2,600 public comments received on a proposed California Supreme Court (Court) Rule implementing a fingerprinting requirement for licensed attorneys pursuant to recent amendments to Business and Professions (B&P) Code section 6054, effective January 1, 2018. Staff organized the comments, and responses thereto, and made revisions to the proposed Court Rule based on the comments. The Board authorized an additional 30 day period for public comment on the amended proposed Rule. The State Bar received 169 new public comments pursuant to the February comment period.

This agenda item is divided into four primary sections. The first addresses the new public comments and recommends that the Board direct staff to petition the Court for adoption of the proposed Rule.

The second discusses staff's proposed schedule for the fingerprinting of attorneys, and recommends that the Board adopt this schedule.

The third discusses staff's proposed approach for granting reductions in fingerprint processing fees for attorneys with demonstrable financial hardship, and recommends approval of this policy by the Board.

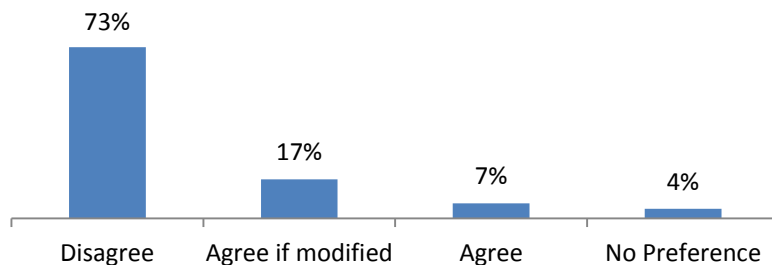
Finally, the Board is asked to authorize, for a 30-day public comment period, a proposed State Bar Rule regarding the impact of non-compliance with the proposed Court Rule.

I. RETURN FROM PUBLIC COMMENT

On November 3, 2017, the Board authorized a 45-day public comment period for a proposed Rule implementing a fingerprinting requirement for licensed attorneys. The public comment period began on November 9, 2017, and closed on December 26, 2017. The State Bar received over 2,600 public comments. At the January 27, 2018, Board meeting, staff summarized the public comments and presented revisions to the proposed Rule based on those comments. The Board accordingly authorized an additional 30-day public comment period for the amended proposed Rule. The corresponding Board agenda item is provided as Attachment A. The second comment period began on February 1, 2018, and ended on March 3, 2017.

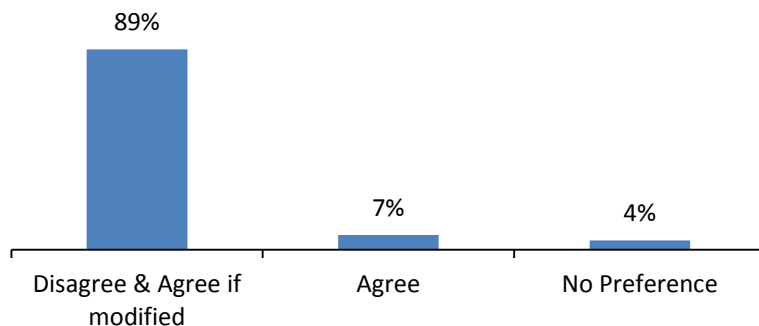
On February 16, 2018, the State Bar sent an email to all California attorneys (active and inactive) alerting them of the amended proposed Rule and the public comment process. The State Bar received 169 new public comments. The full text of these comments is provided as Attachment B.

Figure 1 – Summary of New Comment on Amended Proposed Rule



As with the first set of public comments, commenters who “agreed only if modified” primarily expressed identical concerns as those who “disagreed” with the Rule, making the distinction inconsequential. For instance, many attorneys “disagreed” with the Rule because they felt they should not have to pay for the fingerprinting, while other attorneys “agreed only if modified” because they felt the Rule should be altered to remove the payment requirement or to shift the costs to the State Bar.

Figure 2 – Summary of New Comments on Amended Proposed Rule (“disagree” and “agree only if modified” combined)



The comments overwhelmingly reflect the same concerns and themes that were addressed in the January 27, 2018, Board Agenda item on this topic. The only exception to this general observation about the similarity of comments to those received in the first round, were two

comments seeking clarification in the language regarding fingerprinting active attorneys in foreign jurisdictions. The language of the amended proposed Rule currently provides:

Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyState Bar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

The commenters pointed out that this language is unduly restrictive because fingerprint services may be located in the jurisdiction but may be prohibitively expensive and/or otherwise inaccessible. Commenters also indicated that a strict reading of the last sentence of the Rule would mandate that an attorney only in the United States for a week who then returns to a foreign country would only have 60 days to be fingerprinted. Staff suggests clarifying the Rule as follows:

Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction where the attorney is physically located, or the attorney is able to provide evidence that he/she is unable to access or afford such services, the attorney must notify the State Bar using a form available through the attorney's MyState Bar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States for a period of not less than 60 days.

With this minor modification, staff recommends that the Board approve sending the amended proposed Rule (provided as Attachment C) to the California Supreme Court for approval.

II. FINGERPRINT SCHEDULING

The proposed Court Rule provides that "The Board of Trustees of the State Bar must develop a schedule for implementation that requires all attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019."

In order to effectuate this requirement, staff in the Office of Attorney Regulation and Consumer Resources (ARCR) – the Office of the State Bar responsible for maintaining attorney records and monitoring compliance with Minimum Continuing Legal Education requirements – will provide impacted attorneys with detailed instructions on how to successfully comply with the Rule and the requisite timeline for such compliance. ARCR will provide impacted attorneys with advance notification of the proposed penalty schedule which is outlined in Table 1 below.

The proposed notification and penalty schedule has six stages of notifications. The initial notification will occur within seven business days from which the Rule is approved by the Court. Reminder notifications will be sent approximately every two months thereafter until compliance or penalties begin to attrite. The penalties specified in Stages 4 and 5 are cumulative. The first penalty will be levied on May 1, 2019. Penalties will increase thereafter up to the date of involuntary suspension, December 1, 2019.

Table 1 – Proposed Notification and Penalty Schedule for Active and Inactive Attorneys¹

Stage	Description	Timeline
Stage 1	Initial Notice of Fingerprint Requirement	May 2018
Stage 2	Noncompliance Reminders	June 1, 2018 - Jan 31, 2019
	First Reminder	June 1, 2018 - July 31, 2018
	Second Reminder	Aug 1, 2018 - Sept 30, 2018
	Third Reminder	Oct 1, 2018 - Nov 30, 2018
	Fourth Reminder	*Dec 3, 2018- Jan 31, 2019
Stage 3	Final Warning Notice	Feb 1, 2019
	Approx. 3 months to comply	Feb 2, 2019 - Apr 30, 2019
Stage 4	Monetary Penalty I - \$75	May 1, 2019
	Approx. 3 months to comply	May 2, 2019 - July 31, 2019
Stage 5	Monetary Penalty II- \$100	Aug 1, 2019
	Approx. 4 months to comply	Aug 2, 2019 - November 30, 2019
	Final Warning Notice of Status Change	Nov 1, 2019
Stage 6	Status Change to Involuntary Inactive	**Dec 1, 2019
* 12/1/18 falls on a Saturday **12/1/19 falls on a Sunday		

Staff reviewed the varying circumstances in which an attorney's status with the State Bar can change and the corresponding varying notification requirements. As a result, staff determined that it was necessary to distinguish the different types of notification language and penalty timelines based on an attorney's status, or Group. The notifications to each Group will provide specific and customized information as follows:

Group A: Compliance Satisfied. Licensed active attorneys for which the State Bar already receives subsequent arrest notifications will not be required to be re-fingerprinted.

Group B: Active Licensed Attorneys. These are all active licensed attorneys as of the date that the Rule is issued except for those who are in compliance (Group A). The number of licensed attorneys in this Group is currently 189,176 active attorneys. These attorneys will be required to re-submit fingerprints to the DOJ and FBI by the target deadlines described above.

Group C: Inactive Attorneys. Licensed attorneys who have voluntarily chosen an inactive status will be notified to comply with the Rule prior to transitioning to active status.

Group D: Not Eligible Attorneys. Licensed attorneys who are not eligible to practice law due to disciplinary and/or administrative actions taken by the State Bar (i.e. involuntarily inactive) will be required to be fingerprinted as a condition of reinstatement pursuant to B&P Code section 6054(b). If not required to apply for reinstatement, licensees must submit proof of fingerprinting within 90 days of transfer to active status or penalties will be imposed.

¹The Proposed Notification and Penalty Schedule assumes the Court will promulgate the proposed Rule by April 30, 2018. The schedule will need to be modified, if the Rule is adopted after the estimated April date.

Group E: *Future Active Attorneys.* The re-fingerprint requirement will apply to future active attorneys, meaning to those who become State Bar licensees after the date that the Rule is issued and for whom the Bar does not already receive subsequent arrest notification information. This will likely be a small population because attorneys are fingerprinted upon application to the State Bar, and the State Bar entered into a subsequent arrest notification contract for applicants effective July 1, 2017. Accordingly, this Group should be limited to attorneys who applied for admission prior to July 1, 2017, but for some reason are not yet admitted at the time the Rule is promulgated. Staff proposes to split this Group into two categories:

(i) All newly licensed attorneys admitted to the State Bar after February 1, 2019, for whom the State Bar is not already receiving subsequent arrest notifications will receive a 90-day extension of the re-fingerprinting requirement, meaning that the due date for re-fingerprinting for this population will be March 1, 2020.

(ii) All newly licensed attorneys admitted to the State Bar after December 1, 2019, for whom the State Bar is not receiving subsequent arrest notifications will be required to submit fingerprints within 90 days of admission.

Group F: *Judges.* Judicial officers will not be required to be re-fingerprinted.

Group G: *Selected Special Admissions Attorneys.* If adopted, the Court Rule will provide the State Bar authority to re-fingerprint attorneys permitted to practice in California pursuant to California Rule of Court rules 9.44 (registered foreign legal consultants), 9.45 (registered legal service attorneys), and 9.46 (registered in house counsel). The Office of Admissions will provide notification to these attorneys regarding the new requirement and they will have 120 days from the date the notice is issued to be fingerprinted or face monetary penalties followed by termination of right to practice in California.²

III. FEE REDUCTIONS

The proposed Court Rule states that “The Board of Trustees of the State Bar must develop procedures for granting waivers of the processing costs of running DOJ and FBI background checks for licensed attorneys with demonstrable financial hardship.”

The “processing costs” referred to in the Rule are the costs of the DOJ and FBI background checks which total \$49 (\$32 for the DOJ background check and \$17 for the FBI background check). This is separate from the costs for fingerprint “furnishing” which is the term used to refer to the process performed by a service center of physically taking the fingerprint images using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents).

Staff recommends fee reductions mirroring the fee waivers and scaling in place for certain licensees’ annual licensing fees pursuant to State Bar Rule 2.10 *et seq.* Specifically, pursuant to State Bar Rule 2.16(C)(1)(c), attorneys with a total gross annual household income from all sources of \$20,000 or less may be granted a waiver of up to 50 percent of annual

² Pursuant to the proposed Rule, these individuals are not mandated to be fingerprinted by the December 1, 2019, deadline. This is because these attorneys are required to renew their applications either yearly (registered in house counsel) or every three years (registered legal services attorneys). Accordingly, by December 2019, most of these individuals will have already been either re-fingerprinted or no longer practicing law in California .

membership fees. Pursuant to State Bar Rule 2.16(A), licensees who have a total gross annual individual income from all sources of less than \$40,000 may be granted a 25 percent reduction in annual membership fees. Accordingly, these same classes of licensees would be granted reductions of 50 percent or 25 percent of the \$49 processing fee costs.

Practically, the State Bar would not be able to pay 25 or 50 percent of the processing fees up front. Accordingly, staff proposes providing eligible attorneys with pre-populated forms with the State Bar billing code, such that the State Bar pays the full fingerprinting costs up front. The 50 or 75 percent “owed” to the State Bar by the attorney would be included in the next licensee billing statement generated.

Additional fee-related public comment was received suggesting that fee waivers should be provided for eligible attorney pursuant to State Bar Rule 2.16(B). Pursuant to this Rule, certain attorneys are provided a 25 percent reduction in annual licensing fees, if their employer receives State Bar Legal Services Trust Fund grants and is a qualified legal service project or qualified support center as defined by statute. In 2017, there were 1,186 attorneys whose employers receive reductions under this Rule. Practically, these fee reductions amount to a donation by the State Bar to these qualified legal services organizations.

Staff does not recommend providing reductions in processing costs for attorneys in this category for the following reasons. First, if the attorney is in a difficult financial situation he/she will be granted a waiver under one of the other considerations discussed above. Second, State Bar Rule 2.15(B) provides a 25 percent reduction for the *employer* paying the employee’s fees. The proposed Rule contemplates the State Bar developing procedures for waivers for “attorneys with demonstrable financial hardship.” Finally, it is not practicable for staff to apply the reductions to employers, rather than individual licensees.

In sum, staff proposes the following policy for fee reductions:

The State Bar will cover a percentage of fingerprint processing costs for licensed attorneys who are eligible for fee scaling or fee waiver of annual licensing fees pursuant to State Bar Rules 2.15(A) and 2.16(C)(1)(c). These attorneys will receive a subsidy for fingerprint processing costs at the same percentage levels as provided for in these Rules; these attorneys will however have to pay for all third-party print furnishing costs.

IV. PROPOSED STATE BAR RULE

B&P Code section 6054(d) states “If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to Rules adopted by the board of trustees.” A proposed Rule, entitled Noncompliance with Attorney Fingerprinting Requirements, has been developed to satisfy this requirement; it is provided as Attachment D.

Pursuant to State Bar Board Book Rule 1.10, staff recommends that the Board request a 30-day public comment period for proposed Rule.

FISCAL/PERSONNEL IMPACT

The total cost to the State Bar of the proposed approach to the application of various fee waiver provisions is approximately **\$128,025**. This estimate takes into account the 277 licensees granted fee reductions in 2017 under State Bar Rule 2.16(c) (1) (c) and the 9,897 licensees granted fee reductions in 2017 under State Bar Rule 2.16(A). These costs will be realized over budget years 2018 and 2019.

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 1. Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: c

Implement and pursue governance, composition, and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolutions:

RESOLVED, that the Board of Trustees hereby authorizes staff to submit the proposed Court Rule, attached hereto as Attachment C, to the California Supreme Court for approval; and it is

FURTHER RESOLVED, that the Board of Trustees hereby adopts the proposed Notification and Penalty Schedule as described in this Board Item; and it is

FURTHER RESOLVED, that the Board of Trustees hereby adopts the proposed policy for fingerprint processing fee reductions as described in this Board Item; and it is

FURTHER RESOLVED, that the Board of Trustees authorizes staff to make available for a 30-day public comment period the proposed State Bar Rule attached hereto as Attachment D.

ATTACHMENT(S) LIST

- C.** January 27, 2018 Board Agenda Item
- D.** Text of Public Comment
- E.** Text of Proposed California Rule of Court
- F.** Text of Proposed State Bar Rule